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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/719,200	11/20/2003	Melinda Penney	12966-005001	1980
26161	7590	09/09/2004	EXAMINER	
FISH & RICHARDSON PC 225 FRANKLIN ST BOSTON, MA 02110			VERBITSKY, GAIL KAPLAN	
			ART UNIT	PAPER NUMBER
			2859	

DATE MAILED: 09/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/719,200	PENNEY ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Gail Verbitsky	2859	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on \_\_\_\_.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-27 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_ is/are allowed.
- 6) Claim(s) 1-11 and 14-27 is/are rejected.
- 7) Claim(s) 12 and 13 is/are objected to.
- 8) Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. ____.  |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>04/19/2004 and 06/21/2004</u> | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
|  | 6) <input type="checkbox"/> Other: ____.                                    |

## DETAILED ACTION

### *Specification*

1. The disclosure is objected to because of the following informalities: "ductile polymer" as stated in claim 25 has not been described in the specification. Appropriate correction is required.

### *Claim Objections*

2. Claims 1, 14, 25 are objected to because of the following informalities: Perhaps applicant should insert –living-- before "being" in line 3 of claim 1, and line 3 of claim 27. Perhaps applicant should replace "parent's" in line 4 with –living being—in order to maintain consistency in terminology throughout the claims. Appropriate correction is required.

3. The numbering of claims is not in accordance with 37 CFR 1.126 which requires the original numbering of the claims to be preserved throughout the prosecution. When claims are canceled, the remaining claims must not be renumbered. When new claims are presented, they must be numbered consecutively beginning with the number next following the highest numbered claims previously presented (whether entered or not).

Misnumbered claims 12-29 have been renumbered as claims 11-27.

### *Claim Rejections - 35 USC § 103*

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

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invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1-2, 4, 10, 11, 16-18, 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Babkes (U.S. 6634789) in view of JP 61270631 [hereinafter JP].

Babkes discloses in Figs. 1-3 a digital thermometer for measuring a temperature of a living body by inserting a portion of a thermometer probe in a mouth of the living body. The probe has a first (distal) end, a second (proximal) end and an intermediate portion. A temperature sensor is disposed near the distal end of the probe. The device also has a housing portion separate from the probe and having a display for displaying the measured temperature. The device also has an electronic circuitry within the housing in communication with the temperature sensor to receive a signal from the temperature sensor and translate the signal into a signal representative of the temperature measured by the temperature sensor, the translated data is being displayed on the digital display.

For claims 10-11: Babkes discloses a storage chamber 182 including an opening to receive the probe so as the probe can be inserted in a probe cover 184 located in the chamber and pull said probe cover from the chamber 182. The chamber 182 is configured to receive replaceable probe covers (cartridge). The probe is connected to the housing by a cord and having a chamber to store the probe. There is a (control) button 168 in the vicinity of probe to eject probe cover in a bio waste.

Babkes does not explicitly teach that the intermediate portion of the probe having non-linear shape, as stated in claim 1, that it is fixed as a non-linear shape, as stated in claim 2, with the remaining limitations of claims 4, 10-11, 18, 23

JP discloses in Figs. 2-3 a device having a thermometer probe having a first end, a second end and a fixed curved (non-linear) intermediate portion. As shown in Fig. 2, the intermediate portion has a curve of a substantially constant radius.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the shape of the probe disclosed by Babkes, so as to have a curved intermediate portion, as taught by JP, in order to allow the user to position the probe onto a patient's upper lip to perform a stable, easy and accurate thermometry without making significant accommodations.

6. Claims 1, 3, 5-11, 16-17, 21-23, 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Babkes in view of Haberl (U.S. 6105620).

Babkes discloses in Figs. 1-3 a digital thermometer for measuring a temperature of a living body by inserting a portion of a thermometer probe in a mouth of the living body. The probe has a first (distal) end, a second (proximal) end and an intermediate portion. A temperature sensor is disposed near the distal end of the probe. The device also has a housing portion separate from the probe and having a display for displaying the measured temperature. The device also has an electronic circuitry within the housing in communication with the temperature sensor to receive a signal from the temperature sensor and translate the signal into a signal representative of the temperature measured by the temperature sensor, the translated data is being displayed on the digital display. Furthermore, Babkes discloses a storage chamber 182 including an opening to receive the probe so as the probe can be inserted in a probe

cover 184 located in the chamber and pull said probe cover from the chamber 182. The chamber 182 is configured to receive replaceable probe covers (cartridge). The probe is connected to the housing by a cord and having a chamber to store the probe. There is a (control) button 168 in the vicinity of probe to eject probe cover in a bio waste.

Babkes does not explicitly teach that the intermediate portion of the probe having non-linear shape, as stated in claim 1, with the remaining limitations of claims 1, 3, 5-11, 16-17, 21-23, 26.

For claims 5-7, 23, 26: Habert discloses a flexible tube/ probe device comprising a stiffening core/ wire (hard core/ material) 4 and a flexible sheath (exterior portion/ hose) 1 inherently formed of a relatively soft material. This would imply, that the device can be shaped in any shape including having linear ends and non-linear intermediate portion, and that the intermediate portion can be first made linear, stay linear, till it moved to another, non-linear shape.

For claim 8: the stiffener can comprise more strings (segmented) (col. 3, line 30-31)

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the shape of the probe disclosed by Babkes, so as to have a curved intermediate portion, as taught by JP, in order to allow the user to position the probe onto a patient's upper lip to perform a stable, easy and accurate thermometry without making significant accommodations.

7. Claims 1, 3, 5-11, 16-17, 19-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Babkes in view of Eagan (U.S. 5445026).

Babkes discloses in Figs. 1-3 a digital thermometer for measuring a temperature of a living body by inserting a portion of a thermometer probe in a mouth of the living body. The probe has a first (distal) end, a second (proximal) end and an intermediate portion. A temperature sensor is disposed near the distal end of the probe. The device also has a housing portion separate from the probe and having a display for displaying the measured temperature. The device also has an electronic circuitry within the housing in communication with the temperature sensor to receive a signal from the temperature sensor and translate the signal into a signal representative of the temperature measured by the temperature sensor, the translated data is being displayed on the digital display. Furthermore, Babkes discloses a storage chamber 182 including an opening to receive the probe so as the probe can be inserted in a probe cover 184 located in the chamber and pull said probe cover from the chamber 182. The chamber 182 is configured to receive replaceable probe covers (cartridge). The probe is connected to the housing by a cord and having a chamber to store the probe. There is a (control) button 168 in the vicinity of probe to eject probe cover in a bio waste.

Babkes does not explicitly teach all the limitations of claims 1, 3, 5-11, 16-17, 19-26.

Eagan discloses in Fig. 1 a device comprising a deformable probe arm 12 having a first end with a sensor (microphone), a second end 12a and an intermediate curved portion 12b. The probe arm 12 including the curved portion 12b can be deformed in a plurality of shapes. This would imply, that its intermediate portion could be straight (linear) then deformed to be curved (non-linear). An exterior sleeve 16 made of a

flexible/ soft material such as rubber, foam plastic having an inner spirally wound ductile metallic ribbon (stiffening element) (col. 4, lines 40-66) that permits a desired shaping of the probe arm 12 including the intermediate portion 12b.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the probe, of the device disclosed by Babkes, reshapable, so as to have a curved intermediate portion, as taught by Eagan, in order to allow the user to reach the cavity of the patient's from different positions and angles.

For claim 9: the use of the particular material, i.e., polymer, as stated in claim 9, for the intermediate portion, absent any criticality, is only considered to be the "optimum" material that a person having ordinary skill in the art at the time the invention was made using routine experimentation would have found obvious to provide for the intermediate portion disclosed by Babkes since it has been held to be a matter of obvious design choice and within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use of the invention. In re Leshin, 125 USPQ 416.

For claim 24: the use of the particular material, i.e., malleable metal, as stated in claim 24, for the stiffening element, absent any criticality, is only considered to be the "optimum" material that a person having ordinary skill in the art at the time the invention was made using routine experimentation would have found obvious to provide for the stiffening element disclosed by Babkes and Eagan since it has been held to be a matter of obvious design choice and within the general skill of a worker in the art to select a

known material on the basis of its suitability for the intended use of the invention. In re Leshin, 125 USPQ 416.

For claim 25: the use of the particular material, i.e., ductile polymer, as stated in claim 25, for the probe, absent any criticality, is only considered to be the “optimum” material that a person having ordinary skill in the art at the time the invention was made using routine experimentation would have found obvious to provide for the probe element disclosed by Babkes and Eagan since it has been held to be a matter of obvious design choice and within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use of the invention. In re Leshin, 125 USPQ 416.

8. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Babkes and JP as applied to claims 1-2, 4, 10, 11, 16-18, 21 above, and further in view of Zaragoza et al. (5133606) [hereinafter Zaragoza].

Babkes and JP disclose the device as stated above in paragraph 5.

They do not explicitly teach a hard core and a soft polymeric sheath, as stated in claim 14.

Zaragoza discloses a thermometer probe having a resilient probe cover which is softer than the probe (abstract).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the device, disclosed by Babkes and JP, so as to

have a probe sheath softer than the core of the probe, as taught by Zaragoza, in order to form a gripping portion, as already suggested by Zaragoza.

9. Claims 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Babkes and JP as applied to claims 1-2, 4, 10, 11, 16-17, 21 above, and further in view of Saccardo et al. (U.S. 6491630) [hereinafter Saccardo].

Babkes and JP disclose the device as stated above in paragraph 5.

They do not explicitly teach a pivotal display, as stated in claim 15.

Saccardo discloses a hand held device having a display pivotably attached to a housing, as shown in Figs. 1, 3.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the device, disclosed by Babkes and JP, so as to have a pivotally attached display, as taught by Saccardo, in order to allow the user to close the device when not in use, so as to prevent the display from damage.

10. Claims 18-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Babkes and JP as applied to claims 1-2, 4, 10, 11, 16-17, 21 above, and further in view of Haghkar (U.S. 5044770).

. Babkes and JP disclose the device as stated above in paragraph 5.

They do not explicitly teach a retractable cord, as stated in claim 18 and the remaining limitations of claim 19.

Haghkar discloses a thermometer comprising a probe, a housing and a retractable cord (cable) 13 which when a reel (actuator) 23 is actuated, retracts inside, and the cable 13 is stored within the housing when the probe is not in use.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the device, disclosed by Babkes and JP, so as to have a retractable cord/ cable, as taught by Haghkar, so as to allow the user to store the cord/ cable within the housing when the probe is not in use, in order to prevent the cord from being tangled or damaged.

11. Claim 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Babkes and Eagan as applied to claim 1, 3, 5-11, 16-17, 19-26 above, and further in view of JP.

Babkes and Eagan disclose the device as stated above in paragraph 7.

They do not explicitly teach the limitations of claim 27.

JP suggests placing the probe with its curved intermediate portion onto a patient's lip, as shown in Fig. 3.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the device, disclosed by Babkes and Eagan, so as to place it onto the patient's lip, as taught by JP, in order as to allow the user to have their hands free while taking measurements.

***Allowable Subject Matter***

12. Claims 12-13 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The prior art cited in the PTO-892 and not mentioned above disclose related devices and methods.

Any inquiry concerning this communication should be directed to the Examiner Verbitsky who can be reached at (571) 272-2253 Monday through Friday 8:00 to 4:00 ET.

GKV

*Gail Verbitsky*  
*Primary Patent Examiner, TC 2800*



August 26, 2004